NO. 48862-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO GUZMAN RODRIGUEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable G. Helen Whitener, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE ATTEMPTED SECOND DEGRDEE MURDER AND FIRST DEGREE ASSAULT ARE THE SAME IN LAW AND FACT AND THE CONVICTIONS FOR BOTH VIOLATE DOUBLE JEOPARDY.

The State argues that Guzman Rodriguez's convictions and sentences for both second degree murder and first degree assault do not violate double jeopardy because the offenses are not the same in law and fact. The State's claim rests on its assertion that the intent element is different for each crime the two offenses so they are not the same in law. Brief of Respondent (BOR) at 8 and 13. It asserts that there were two separate acts and each act constituted each offense so the two offenses are not the same in fact. BOR 13. The State's argument misconstrues the applicable law, relies on a misunderstanding of the facts and the jury's verdicts, and is inconsistent with its arguments at trial.

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. In re Orange, 152 Wn.2d 795, 817, 100 P.3d 291 (2004) (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180 (1932)). Double jeopardy is violated where the evidence required to support a conviction for one of the

crimes would have been sufficient to warrant a conviction for the other. Orange, 152 Wn.2d at 820 (citations omitted). The issue in this case is whether the evidence required to support a conviction for attempted second degree murder and not attempted first degree murder would have been sufficient to warrant a conviction for first degree assault. Orange, 152 Wn.2d at 820. It was. Under this Blockburger/Orange test Guzman Rodriguez's convictions for the two offenses violated double jeopardy.

a. In this case Attempted Second Degree Murder and First Degree Assault are the same in law.

The State contends that the attempted second degree murder and first degree assault convictions are not the same in law, because it charged Guzman Rodriguez with attempted first degree murder and the evidence established commission of that crime, which requires premeditated intent, and the intent element of second degree murder is different than the intent element of first degree assault. BOR at 8-9. The State's argument is flawed for three reasons. First, the charged offense at issue is attempted second degree murder and not attempted first degree murder. Second, the elements of attempted second degree murder and first degree assault share the same intent devoid of any factual analysis. Third, under the Blockburger/Orange test the elements of the offenses are not compared in

the abstract but in light of how the offenses where charged and the facts to support each offense.

The State argues it charged Guzman Rodriguez with attempted first degree murder and the evidence supported "a showing of premeditated intent to cause her (Mejia's) death and the substantial step he took to further that purpose." BOR at 7. According to the State, there was evidence Guzman Rodriguez knelt on the bed with the scarf and told Mejia he was going to kill her and that constituted a substantial step that proved his premeditated intent to cause her death. The State contends because this evidence was independent of the evidence that supported the assault the two offenses are not legally the same. Id. at 8.

To prove an attempt to commit a crime the evidence must establish the defendant took a substantial step towards the commission of the crime. State v. Workman, 90 Wn.2d 443, 449-450, 584 P.2d 382 (1978). A person commits attempted first degree murder when, with premeditated intent to cause the death of another, he takes a substantial step toward commission of that act. A person is guilty of attempted second degree murder when, with unpremeditated intent to cause the death of another, he takes a substantial step toward commission of that act. The difference between first and second degree murder is premeditation. State v. Brooks,

97 Wn.2d 873, 876, 651 P.2d 217 (1982); cf. RCW 9A.32.030(1)(a) and 9A.32.050(1)(a).

Under RCW 10.61.003 a jury may find a defendant not guilty of the charged offense but guilty of an inferior degree offense. First degree murder and second degree murder proscribe only one offense divided by statute into degrees. RCW 9A.32.030; RCW 9A.32.050. Second degree murder is an inferior degree of first degree murder. State v. Johnston, 100 Wn.App. 126, 134, 996 P.2d 629, review denied, 11 P.3d 827 (2000). Each party has a right to an inferior degree offense instruction. State v. Corey, 181 Wn.App. 272, 276, 325 P.3d 250, review denied, 181 Wn.2d 1008 (2014).

In this case the State proposed the attempted second degree murder instructions. 9RP 123-124. By requesting and receiving those instructions the State "charged" Guzman Rodriguez with that crime and that was the crime he was convicted of in addition to first degree assault. The proper analysis is whether the evidence required to support a conviction for attempted second degree murder would have been sufficient to warrant a conviction for first degree assault. And, if so, the convictions for both violate double jeopardy.

The jury's acquittal on the attempted first degree murder charge necessarily means it did not find that the evidence showed Guzman

Rodriguez took a substantial step towards committing attempted first degree murder. Whether the State believes the evidence that Guzman Rodriguez knelt on the bed with the scarf in his hands and told Mejia he was going to kill her was a substantial step that proved premeditated intent is irrelevant to the analysis. The issue is whether the acts establishing a substantial step that Guzman Rodriguez had the unpremeditated intent to cause Mejia's death were the same to prove he intended to inflict great bodily harm with a deadly weapon or by any force or means likely to produce great bodily harm or death. RCW 9A.36.011(a). The State's belief that evidence of Guzman Rodriguez's premeditated intent to kill Mejia and was distinct from or different than the evidence the evidence that established the assault simply does not support the conclusion it makes that the two offenses at issue are not the same in law.

The State also argues that the "offenses are not identical in law" because proof of "either crime did not necessarily prove the other because the intent element is different for each crime" BOR at 9. The double jeopardy analysis, however, does not depend on whether the elements of second degree murder and first degree assault are different. Comparing the elements at that abstract level is a misapplication of the Blockburger test. Orange, 152 Wn.2d at 817. "Unless the abstract term "substantial step" is given a factual definition, there is simply no way to assess whether

attempted murder requires proof of a fact not required in proving the assault." Id.

Furthermore, even if the elements are compared in the abstract, proof of the intent element of second degree murder establishes the intent element of first degree assault. Proof of first degree assault does not necessarily prove second degree murder because an intent to inflict great bodily harm with a deadly weapon or by any force or means likely to produce great bodily harm or death (RCW 9A.36.011(a)) is not always proof of an intent to cause death (RCW 9A.32.050 (1)(a)). But, a person who intends to cause death also necessarily intends to inflict great bodily harm by means likely to cause great bodily harm or death. See, State v. Read, 100 Wn.App. 776, 792, 998 P.2d 897 (2000) (second degree murder and first degree assault are the same in law because "proof of second degree intentional murder necessarily also proves first degree assault"); see also State v. Hart, 188 Wn.App. 453, 459, 353 P.3d 253 (2015) (second degree murder and second degree assault are the same in law because a person who intends to cause death also intends to assault a person). Contrary to the State's assertion, the intent element of second degree murder and first degree assault are the same in law. State v. Davis, 174 Wn.App. 623, 632, 300 P.3d 465 (2013).

b. In this case Attempted Second Degree Murder and First Degree Assault are the same in fact.

The State's second argument is that the two offenses here are not the same in fact. BOR at 9-13. The State is again wrong.

In support of its argument the State asserts the attempted second degree murder and the first degree assault were predicated on two separate acts. BOR at 10. The State contends that Guzman Rodriguez "completed the substantial step towards murder when he went into Mejia's bed with the scarf, wrapped it around both his hands, and looped it around her neck." Id. at 11. The State asserts the first degree assault, however, was committed when Guzman Rodriguez "manually strangled Mejia with his hands." Id.

The first problem with the State's assertion is that it directly conflicts with its primary theory at trial. At trial, the State's primary theory was that strangling Mejia with the scarf was the substantial step that proved Guzman Rodriguez's intent to kill her (attempted murder) *and* his intent to inflict great bodily harm with a deadly weapon or by any force or means likely to produce great bodily harm or death (first degree assault).

During closing argument, the State argued that Guzman Rodriguez's statement he was going to kill Mejia coupled with his act of

strangling her with the scarf established his intent to kill and also the necessary substantial step required to prove he attempted to kill her. 10RP 48.[1] The State argued the same evidence showed that Guzman Rodriguez intended to inflicted great bodily harm. 10RP 46-47. The State argued the jury could find the deadly weapon or any force or means likely to produce great bodily harm or death element of first degree assault was satisfied because Guzman Rodriguez strangled Mejia with a ligature (the scarf). 10RP 49-51. In its rebuttal the State made essentially the same argument: "And, a force or means, where you're constricting someone's throat, where you're wrapping a ligature around that throat, and you're pulling it, is a force or means likely to produce great bodily harm." 10RP 81-82.

Then, at sentencing, the State conceded the same acts proved both offenses. "They (attempted second degree murder and first degree assault) involve the same victim, they involve the same general intent, and they involve the same time and place." 12RP 15. "In fact, it was the same act or series of acts that constitutes the facts underlying both of these offense." Id.[2] (emphasis added).

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[1] "So during this time, keeping that pressure on a person's neck while she is desperately trying to get him off her and the scarf off her, that resoluteness, those actions show exactly what the defendant wanted to do to Leonila (Mejia), that he wanted to and tried to kill her." 10RP 48.

[2] Although the State also argued the offenses did not "merge" (12RP 15-16) the merger doctrine would not apply as a matter of law in any event. See State v. Freeman, 153

Thus, the State's primary trial theory was that the same act—strangling Mejia with the scarf—established the intent element for both murder and first degree assault, and also the substantial step element of attempt. The State's contention on appeal, that the attempted second degree murder and the first degree assault were predicated on two separate acts, is wholly inconsistent with its theory at trial and its position at sentencing.

The second problem with the State's argument is that Guzman Rodriguez's strangling Mejia with the scarf and his hands was one continuous assault. Evidence that multiple acts are intended to secure the same objective supports a finding that the defendant's conduct was a continuing course of conduct. State v. Handran, 113 Wn. 2d 11, 17, 775 P.2d 453 (1989). Assault can be a continuing course of conduct crime. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 985, 329 P.3d 78 (2014).

In State v. Rodriquez, 187 Wn.App. 922, 352 P.3d 200 (2015), Rodriquez went to Hendon's home, grabbed her by the throat and squeezed, threatened to "kick [her] ass" and told her, "I'm going to fuck you up, bitch." Id. at 926. Following the encounter Hendon followed Rodriquez upstairs to a hallway where he hit her in the jaw and choked her

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Wn.2d 765, 772-773, 108 P.3d 753 (2005) (merger doctrine applies when the degree of one offense is raised by conduct separately criminalized by the legislature).

again. The two then moved to the kitchen and Rodriquez repeated what he said earlier, hit Hendon and choked her a third time. Id. at 927.

Under these facts the Rodriquez court found the multiple acts of strangulation were the same continuing course of conduct. Rodriquez, 187 Wn.App at 937. It reaching that conclusion it reasoned the assaults involved the same parties, occurred in the same place, were intended to achieve the same common objective, and they occurred over a short period of time. Id. at 937: See State v. Villanueva-Gonzalez, 180 Wn.2d at 986-987 (assaultive acts were one continuous course of conduct because they took place in the same location over a short time period, there was no indication in the record of any interruptions, and there is no evidence to suggest the defendant had a different intention or motivation).

The evidence in this case shows that when Mejia woke up Guzman Rodriguez was kneeling on the bed with a scarf in his hands, he told her that he had to kill her, and he put the scarf around her neck and tightened it. 6RP 44-46. The two struggled and fell off the bed and Guzman Rodriguez started to strangle Mejia with his hands. 6RP 47-48. The two acts involved the same parties, occurred at the same place, where intended to achieve the same result---to kill Mejia---and occurred over an extremely short period of time. They were one continuous assault.

That is also how the State argued the case at trial. Although the State's primary theory was that the strangulation with the scarf was the substantial step that established the attempt to commit murder and the intent to inflict great bodily harm with a deadly weapon or any force or means likely to produce great bodily harm or death elements of first degree assault, it also argued the evidence that Guzman Rodriguez manually squeezed Mejia's neck likewise supported a finding of a substantial step towards the commission of murder. The State implicitly recognized that strangling Mejia was one continuing assault.

> "The defendant wrapped that scarf around his hands then wrapped it around her (Mejia's) neck and squeezed." He struggled with her. She fought with him. He kept the pressure on.
>
> She got away from him, and he grabbed her again and again squeezed her hands—her neck with his hands. All of these were substantial steps toward committing the crime of Murder in the First degree."

10RP 44.

The third fatal problem with the State's argument is that it fails to point to anything in the record that shows the jury relied on the evidence Mejia was strangled with the scarf to find a substantial step to support the attempted murder and the evidence that Guzman Rodriguez strangled her with his hand to support the first degree assault. That is because the verdicts are ambiguous.

The jury was instructed that to convict Guzman Rodriguez of first degree assault it had to find he "intended to inflict great bodily harm with a deadly weapon or by any force or means likely to produce great bodily harm or death." CP 54 (Instruction No. 21). It was instructed that deadly weapon "means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP 53 (Instruction No. 20). It was not required to unanimously agree whether Guzman Rodriguez used a deadly weapon (which the State argued was the scarf) or unanimously agree that he used any other "force or means" to commit the assault, nor was it asked to determine by special verdict whether the scarf as used was a deadly weapon. Some jurors could have found that in the manner in which it was used the scarf was a deadly weapon likely to produce great bodily harm or death, some jurors could have found the scarf was not a deadly weapon but that strangling Mejia with the scarf was force or means likely to produce great bodily harm, and some jurors could have found that the scarf was not a deadly weapon but strangling Mejia with both the scarf and manually was the force or means likely to produce great bodily injury or death.

Under the double jeopardy merger doctrine, Washington courts hold that where the verdict is ambiguous the rule of lenity requires merger,

State v. Kier, 164 Wn. 2d 798, 808-14, 194 P.3d 212 (2008); State v. DeRyke, 110 Wn. App. 815, 823-24, 41 P.3d 1225 (2002), *aff'd on other grounds*, 149 Wn.2d 906, 73 P. 3d 1000 (2003). For example, DeRyke was convicted of first degree kidnapping and first degree attempted rape. DeRyke, 110 Wn. App. at 818. Two circumstances could elevate rape to first degree: (1) use of a deadly weapon or (2) kidnapping the victim. Id. at 823. If the jury used the kidnapping to elevate the rape offense. DeRyke could not also be separately convicted of kidnapping; that offense would merge with the rape. Id. at 823-224. DeRyke could only be convicted of both kidnapping and rape if the jury used the deadly weapon to elevate rape to the first degree. Id.

There was no doubt the jury concluded DeRyke was armed with a deadly weapon for both offenses because it returned special verdicts to that effect. Id. at 818, 824. However, the DeRyke court was unwilling to assume the jury relied on use of a deadly weapon because the State did not submit jury instructions or special verdicts requiring the jury to specify which act it relied on in reaching its verdict on the rape charge. Id. at 824. The court instead applied the general rule that ambiguous verdicts are interpreted in the defendant's favor and assumed the jury relied only on the kidnapping to elevate the rape to first degree. Id. The kidnapping conviction therefore merged into the attempted rape conviction. Id.

In Kier, the State argued Kier's second degree assault and first degree robbery convictions did not merge because they were committed against different victims. Kier, 164 Wn.2d at 808. Noting the case was somewhat analogous to a multiple acts case, the Court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Kier, 164 Wn.2d Id. at 811. Because the evidence and instructions allowed the jury to consider whether a single person was the victim of both the robbery and assault, the Court concluded verdict was ambiguous. Id. at 814. The rule of lenity therefore required the assault conviction to merge into the robbery conviction. Id.

Guzman Rodriguez's use of the scarf, his hands, or both to strangle Mejia established the substantial step element of attempted murder. It is unclear whether the jury found that in the manner the scarf was used whether the scarf was a deadly weapon likely to cause harm or death, or whether either Guzman Rodriguez's use of the scarf, his hands or both was the force or means likely to cause harm or death. Under the Kier and DeRyke holdings it must be assumed the jury found the evidence that established the substantial step to support the attempt element of murder was the same evidence that established the elements of first degree assault, which is also consistent with the State's theory at trial.

Contrary to the State's assertion on appeal, for all the reasons above either singularly or cumulatively, the offenses of attempted second degree murder and first degree assault were the same in fact. The same acts established the substantial step that proved the intent to kill and the intent to inflict harm with a weapon or by any force or means likely to cause harm or death.

c. Under the Blockburger/Orange test, the crimes of Attempted Second Degree Murder and First Degree Assault were the same in fact and in law and the convictions for both violate double jeopardy.

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. State v. Villanueva-Gonzalez, 180 Wn.2d at 981 (citation omitted); Orange, 152 Wn.2d at 817 (citations omitted). Where one of the offenses is an attempt the facts of the case give the substantial step element required to prove an attempt independent meaning. In re Borrero, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007). "Only by examining the actual facts constituting the 'substantial step' can the determination be made that the defendant's double jeopardy rights have been violated." Id. "Unless the abstract term 'substantial step' is given a factual definition,

there is simply no way to assess whether attempted murder requires proof of a fact not required in proving the assault." Orange, 152 Wn.2d at 818.

Here, the act of strangulation with the scarf or manually or both was the substantial step that corroborated the intent element of second degree murder and the intent of inflict great bodily harm with a deadly weapon or any force or means likely to produce great bodily harm or death elements of first degree murder. Brief of Appellant (BOA) at 15-16. The two offenses were the same in law and fact because the evidence to support the substantial step requirement of attempted second degree murder was the same evidence that was required to support the assault conviction. See Orange, 152 Wn.2d at 820 (attempted first degree murder and first degree assault were the same in law and fact because shooting at the victim established the substantial step requirement to support attempted first degree murder as well as the elements of first degree assault committed with a firearm).

On these facts, the evidence required to support the attempted second degree murder conviction was sufficient to support the first degree assault conviction as charged and found by the jury. As the State correctly argued at trial, "it was the same act or series of acts that constitutes the facts underlying both of these offense." 12RP 15. The proper application of the Blockburger/Orange analysis leads to the conclusion that Guzman

Rodriguez's convictions for both second degree attempted murder and first degree assault violate double jeopardy. Guzman Rodriguez's first degree assault conviction should be vacated. BOA at 17.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND WAIVE APPELLATE COSTS IF THE STATE SUBSTANTIALLY PREVAILS.

The State asks that Guzman Rodriguez's request that this Court waive the cost of the appeal should not be addressed because the State has not yet shown it has prevailed on appeal and therefore it has not yet submitted a cost bill. BOR at 17. This Court can and should address the issue.

The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. Thus, this Court has the discretion to deny appellate costs. BOA at 18 (citing RCW 10.73.160(1) and State v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000); see also State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016) (appellate court has discretion to direct that costs not be awarded to the State).

In Sinclair, Division One held, "The future availability of a remission hearing in a trial court cannot displace this court's obligation to exercise discretion when properly requested to do so. Id. at 388. It

reasoned that remanding the issue of appellate costs to the trial court improperly delegates the issue of appellate costs away from the appellate court, which is assigned to exercise discretion on whether to award those costs and it would be potentially be expensive and time-consuming for courts and parties. Id. at 389. The Sinclair court held raising the issue of appellate costs in the appellant's briefing was the proper time to invoke the court's exercise of its discretion. "We conclude that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." Id. at 389-390. This Court has recently followed the Sinclair court's approach and has ruled on the issue of appellate costs where it was raised in the appellant's brief. State v. Burch, __Wn. App.__, __ P3d.__ , 2016 WL 7449398 at 12 (December 28, 2016) (citing State v. Grant, __Wn.App.__, 385 P.3d 184 (2016)).

Here, the issue is raised in Guzman Rodriguez's brief and the record establishes that any award of appellate costs would be unwarranted in this case. BOA at 18-19. This Court should reject the State's suggestion that it wait until the State submits a cost bill in the event the State is the prevailing party. Under Sinclair and Burch, and for the sake of judicial economy, this Court should address the issue now and waive appellate costs if the State is the prevailing party.

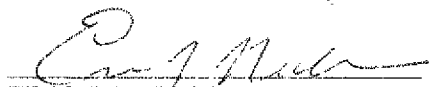
B. CONCLUSION

For the above reasons and the reasons in his Brief of Appellant, Guzman Rodriguez's conviction for first degree assault should be vacated as violating double jeopardy. Alternatively, if this Court finds the State has substantially prevailed it should exercise its discretion and not award the State appellate costs.

DATED this 26 day of January 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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